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IN THE

Supreme Court of the United States

October Term, 1913

No. 73-1914

ADAM J. WESTENHAVER, ET AL., Petitioners,

v.

THE PULLMAN COMPANY, ET AL., Respondents.

BRIEF FOR RESPONDENTS
IN OPPOSITION

EDWARD J. HUSSEY, JR.
WILLIAM J. HUSSEY
[illegible]
[illegible]
[illegible]

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OCTOBER TERM, 1973

No. 73-1914

ADAM J. WESTERMAYER, ET AL., *Petitioners,*

v.

THE PULLMAN COMPANY, ET AL., *Respondents.*

BRIEF FOR RESPONDENT UNIONS IN OPPOSITION

OPINIONS BELOW

The petition includes in an appendix thereto not only the opinion of the Court of Appeals for the Seventh Circuit and the opinion of the District Court for the Northern District of Illinois (which was affirmed by the Seventh Circuit), but the opinion of the District Court for the Eastern District of Missouri (Pet. A 3-A 14). The Sheet Metal Workers' International Association, et al. (Union respondents) suggest that the judgment of the latter court is not properly before the Court for consideration.

QUESTIONS PRESENTED

In the opinion of the Union respondents the question presented for review is whether the dispute was properly dismissed by the lower courts in consideration of the issues presented to such courts, in the light of the record upon which the decisions below were based, and without restriction to grounds stated by the lower courts for dismissal.

STATEMENT OF THE CASE

The Union respondents believe that the Statement of the Case set forth in the petition considered together with the facts found by the lower courts as disclosed by the opinions below presents adequately the nature of the dispute.

ARGUMENT

The decision below is clearly correct, and presents no important question of federal law such as to justify granting the writ and review by this Court.

Contrary to the contentions of the plaintiffs, the decision below is not in conflict with *Glover*[1] and *Czosek*,[2] or any other relevant legal authority relied upon by petitioners.

The petitioners are shown to contend that they were unlawfully deprived of the benefits of a collective bargaining agreement negotiated by the respondents on January 19, 1969.

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[1] *Glover* v. *St. Louis-San Francisco R. Co.*, 393 U.S. 324.

[2] *Czosek* v. *O'Mara*, 397 U.S. 25.

As stated by petitioners (p. 5) the substance of their complaint is that the respondent Pullman Company and the respondent Unions

> conspired so as to ignore the will of the members of the unions as voiced in their strike ballot, that defendant Pullman did not bargain fairly and non-discriminately with the railroad unions, that the defendant unions willfully failed to represent the wishes of the majority of its members, especially the plaintiffs, and the defendant Pullmn (sic) Company know (sic) of this when it entered into the agreement.

Briefly restated, the crux of petitioners' claim against the Unions was to charge a breach of the Unions' duty of fair representation owed to the petitioners, because the Unions ignored the will of their members "as voiced in their strike ballots", in the negotiation of the 1969 agreement.

Whereas the Court of Appeals in somewhat cryptic fashion (Pet. A1) summarily affirmed the judgment of the District Court, the opinion of the latter court contains a description of the background of the dispute and the circumstances attending the negotiation of the involved collective bargaining agreement by the respondents on January 16, 1969. The strike ballot referred to by plaintiffs was included in the record before the District Court, and as noted by that court (Pet. A18) the facts of record disclosed that:

> A strike vote was taken and the strike ballots disclosed an almost unanimously vote in favor of a withdrawal from service if the efforts of the Federation were unsuccessful in negotiating *an acceptable agreement.* (Emphasis supplied) [3]

[3] In a letter accompanying the strike ballot sent by the Unions to the Pullman employees involved, it was stated that the purpose

It is thus shown that in executing the strike ballot each of the petitioners had before him the specific language emphasized above in terms calling for his vote in favor of or against a strike if the respondents failed to reach "an acceptable settlement" of the Unions' request that Pullman agree to amend an earlier collective bargaining agreement so as to provide for payment of separation allowances.

Evaluated in the light of these facts, it is shown that petitioners' real grievance resulted from the failure of the respondent Unions to negotiate an agreement containing provisions more favorable to petitioners, an agreement which would have a retroactive effective date prior to January 1, 1969, and thus include petitioners within the group of Pullman shop craft employees who were benefited by the terms of the agreement as negotiated on January 16, 1969, (Pet. A 19-20). The agreement as negotiated benefited 560 of the total 630 employees involved (Ibid).

It is clear that the relevant and material facts relating to the conduct of the representatives of the Union respondents were presented to and were considered by courts below.

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of the strike ballot was to obtain their "honestly expressed views" for or against a strike, and that if a majority voted in favor of a strike "and a prompt and acceptable settlement of this dispute cannot be secured otherwise", each employee whether he voted for or against a strike would strike when so authorized by his union.

The strike ballot which each such employee was requested to execute contained a statement above the place for his signature that he had carefully read, or heard read, the Official Circular and the ballot, and understood that *the question involved* was that of authorizing a strike and fixing the time therefor, in accordance with the laws of the respective organizations, for the purpose of securing *an acceptable settlement* of the pending notice of September 16 1968 . . . (Emphasis supplied).

It is significant in the Court's consideration of the petition to note that while the judgment of the District Court was technically to grant the respondents' motions to dismiss, such facts were presented to the District Court in support of the Unions' motion for summary judgment.[4]

Whereas the District Court (or the Court of Appeals) could have properly granted the Unions' motion for summary judgment, it is suggested that the failure to do so does not require this Court to disturb the judgment below in view of the correct resolution of the dispute.[5]

In summary, the petition presents a question properly to be disposed of by consideration of the rulings of this Court in *Ford Motor Co.* v. *Huffman,* 345 U.S. 330; 337-339, *Humphrey* v. *Moore,* 375 U.S. 335, 349-350, and *Amalgamated Ry. and Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, 301, explaining the duty of fair representation owed by the collective bargaining representative to the employees within the bargaining unit and the discretion permitted the representative in the negotiation of collective bargaining agreements. There was no material allegation of fact before the District Court to create a genuine issue of

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[4] It is clear from the District Court's opinion that it considered facts presented to it by affidavits supporting the Unions' alternative motion to dismiss or for summary judgment. It is also clear that the Unions' contention that the petitioners had failed to state a claim entitled to relief as concerned their alleged breach of the duty of fair representation was briefed and argued to the Court of Appeals (Pet. A 2).

[5] See *Montana-Dakota Utilities Co.* v. *Northwestern Public Service,* 341 U.S. 246, 249-250; *S.E.C.* v. *Chenery,* 318 U.S. 80, 88; *J. E. Riley Invest. Co.* v. *Commissioner of Int. Rev.,* 311 U.S. 55, 59; *Helvering* v. *Gowan,* 302 U.S. 238, 245-246.

fact, or to support a finding, that the Unions deliberately and in hostile manner discriminated against petitioners.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 1974

Certificate of Service

I certify that service of this brief was made this day by the mailing, postage prepaid, of three (3) copies thereof to counsel for each party of record.

WILLIAM J. HICKEY

July 17, 1974